

MOTION FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

v.

CAROLYN J. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS*
CURIAE OF THE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.**

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**STATEMENT OF INTEREST AND
MOTION FOR LEAVE TO
FILE BRIEF AS *AMICUS CURIAE***

NAACP Legal Defense and Educational Fund, Inc., hereby moves for leave to file the attached brief as *amicus curiae*.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to

the Court. Consent to the filing of this brief has been granted by counsel for respondent but refused by counsel for petitioner. The proposed brief is submitted in support of respondent though advancing reasons somewhat different than those relied on by the court below and by respondent.

WHEREFORE, the NAACP Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

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**BRIEF *AMICUS CURIAE* OF
THE NAACP LEGAL DEFENSE
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ARGUMENT

This case concerns the circumstances in which the current application to an individual employee of a seniority policy which is facially neutral, but which perpetuates the effects of past discrimination against that employee, may be held to constitute a continuing violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* Although petitioner's brief discusses at some length the statutorily prescribed time periods for filing a charge of discrimination with the Equal Employment Opportunity Commission,¹ this requirement does not appear to be at issue here; because the respondent did not file such a

¹ Prior to 1972, former section 706(d) of Title VII provided in pertinent part that a charge "shall be filed within ninety days after the alleged unlawful employment practice occurred." Section 706(e), as amended in 1972, extended this period to 180 days. 42 U.S.C. § 2000e-5(e).

charge within the applicable ninety-day time limit after the concededly unlawful² termination of her employment in 1968, she is forever barred from obtaining the full Title VII relief to which she would otherwise have been entitled solely as a remedy for that unlawful act. The respondent here does not seek such a remedy, but rather seeks relief from the perpetuation of the effects of the prior unlawful termination which she has suffered on a continuing basis since her re-employment by the petitioner in 1972. The issue presented by this case, then, is a narrow one: Where an employee who has been the victim of a discriminatory but previously unchallenged termination is subsequently rehired by the same employer, does the current and continuing denial of the rehired employee's previously accrued seniority rights constitute an unlawful employment practice within the meaning of Title VII?

The language of the statute indicates that this ongoing deprivation of rights is a violation. Section 703(a) not only declares that it is in general unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .,"³ but goes on to specify that it is unlawful for an employer

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁴

An employer who, like the petitioner here, discharges employees because of their sex, and then later rehires them on the condition that they continue to be deprived of the

² Evans' employment was terminated in 1968 in accordance with United's "no-marriage" rule for stewardesses, which was held to violate Title VII in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

³ 42 U.S.C. § 2000e-2(a)(1).

⁴ 42 U.S.C. § 2000e-2(a)(2).

seniority rights which were unlawfully taken from them in the past, is clearly engaged in an ongoing practice which violates this explicit language. Any construction of Title VII which might immunize such conduct from liability would be contrary to the statutory language and would frustrate the congressional intent "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . ." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976).

The legislative history of the Equal Employment Opportunity Act of 1972 supports the plain meaning of the statutory language and demonstrates beyond dispute that Congress intended to prohibit not only individual acts of discrimination, but also policies which perpetuate the effects of past acts of discrimination. As the Senate Committee on Labor and Public Welfare recognized in its report:

Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.⁵

The congressional intent to prohibit continuing violations is clearly manifested in the language of section 706(g), which was amended in 1972 to provide that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g). This provision can have no meaning

⁵ S.Rep. No. 415, 92d Cong, 1st Sess, 5 (1971), quoted in *Franks v. Bowman Transportation Co.*, supra at 765 n.21.

except in the context of a continuing violation which has been occurring over a period far in excess of the 180-day time limit for the filing of a charge prescribed by section 706(e). Within that context it is clear that, although back pay liability is limited, the continuing violation of Title VII is itself an unlawful employment practice which is subject to challenge before the EEOC and in the courts.

The implicit meaning of the back pay limitation contained in section 706(g) was made explicit in the congressional section-by-section analysis of the 1972 Act.⁶ With reference to the time limits for the filing of charges, the analysis stated as follows:

This subsection as amended [section 706(e)] provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law [former section 706(d)] have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.⁷

Thus, it is clear from the statutory language and from the legislative history that Congress intended to outlaw

⁶ The section-by-section analysis was prepared by the Senate co-sponsors of the Act, Senators Williams and Javits. Senator Williams introduced it as "an analysis of H.R. 1746 as reported from the Conference. . . ." 118 Cong. Rec. 7166 (1972). The identical section-by-section analysis was introduced into the House record by Representative Perkins, 118 Cong. Rec. 7563 (1972). The Conference Committee bill was accepted by both chambers. *Id.* at 7170, 7573.

⁷ 118 Cong. Rec. 7167, 7565 (1972).

present, continuing practices which perpetuate the effects of past discrimination, and that Congress intended to grant aggrieved persons the right to file charges with the EEOC—and subsequently to obtain relief from the courts—at any time during the continuing occurrence of such practices. Even in cases which have held that such a continuing violation is not established merely by the continuing nonemployment of a terminated former employee,⁸ the courts have acknowledged that Title VII provides "a remedy for past actions which operate to discriminate against the complainant at the present time," and that this remedy may be available to present employees, including those on layoff status.⁹ *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975) (*en banc*); *Terry v. Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975). Compare *Collins v. United Air Lines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975), with *Gibson v. Local 40, Super-*

⁸ In *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 45 U.S.L.W. 4068 (U.S. Dec. 20, 1976), this Court rejected a claim that the statutory period for filing a charge alleging a discriminatory termination could begin to run from the date of the conclusion of grievance-arbitration procedures, rather than from the date of the termination. That decision is not dispositive of the instant case. There both the parties and the courts below had assumed throughout the proceedings that the discharge was the significant occurrence, *id.* at 4069, whereas here the dispute has been focused from the beginning on the continuing denial of seniority. Moreover, in *Electrical Workers* the Court specifically noted that a different result might obtain if the terminated employee were reinstated, *id.*, which is precisely the case here. Finally, in *Electrical Workers* the Court found no express legislative history indicating the intent of Congress with respect to the effect of grievance procedures on Title VII time limits, but here there are explicit legislative materials demonstrating that Congress intended to permit the filing of a charge at any time during the ongoing occurrence of a continuing violation.

⁹ Even petitioner concedes that a continuing violation may exist where there is an "ongoing seniority or other policy that properly can be said to have had its genesis in the original discriminatory practice or that was or is so inexorably tied to the former discriminatory practice as to represent merely a present extension of it." Brief for Petitioner, at 21. *Amicus* submits that this is just such a case.

cargoes & Checkers, 13 FEP Cases 997, 1004 (9th Cir. 1976).¹⁰ The issue here is whether and to what extent the continuing violation concept applies to a case such as this, where a four year hiatus in the employment relationship has preceded the renewal of that relationship and the commencement of the continuing consequences of the past discrimination.

No prior decision of this Court directly controls the resolution of this question. The Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), found that under Title VII, practices which are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. But the Court was not there confronted with any question as to the continuing nature of any unlawful practice or as to whether a charge had been timely filed in relation to the violation alleged. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court held that constructive seniority is ordinarily required as part of the Title VII remedy for discrimination in hiring, but the Court did not explicitly decide whether the continuing denial of seniority rights stemming from such past discrimination is itself an unlawful practice, nor did the Court have any occasion to consider the point at which a charge must be filed during the continuing occurrence of such a practice.

Nevertheless, the principles underlying these decisions are, as the court below recognized, clearly relevant to the question presented here. In every circuit which has

¹⁰ Petitioner contends that there is a conflict between the Ninth Circuit's decision in *Collins* and the Seventh Circuit's decision in the instant case. The absence of any such conflict is conclusively demonstrated by the Ninth Circuit's specific reliance on the decision of the court below in support of its conclusion in *Gibson* that a continuing seniority preference in union work referrals "perpetrated the effects of past discriminatory practices and constituted a present violation of Title VII." 13 FEP Cases at 1004 and n.20. See *Kennan v. Pan American World Airways, Inc.*, 13 FEP Cases 1530, 1533 (N.D. Cal. 1976).

resolved the matter, the courts have found that facially neutral seniority practices which "freeze the status quo," preventing the victims of past discrimination from attaining their rightful place in the employment hierarchy, are themselves unlawful under Title VII.¹¹ This Court's decision in *Franks* clearly supports this conclusion. There the Court found that Title VII "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 764. The Court also recognized in *Franks* that, due to the ongoing nature and effect of seniority practices, the reform of those practices "cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination . . ." *Id.* at 768 n.28.

Thus, the *Griggs* and *Franks* decisions clearly indicate that a continuing seniority policy which perpetuates the effects of past discrimination against present employees is itself a violation of Title VII. *Amicus* submits that such a policy is unlawful not only as to persons continuously employed since the date of the first discriminatory act against them, but also as to persons who have been discriminatorily terminated and later rehired without their previously accrued seniority. A person in this latter group, in contrast to one who is unlawfully discharged and who thereafter has no further contact with the former em-

¹¹ See *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1970); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976); *United States v. Papermakers Local 189*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir.), cert. filed, 44 U.S.L.W. 3214 (U.S. Oct. 7, 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir.), as modified, 526 F.2d 722 (1975); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1970), cert. denied, 404 U.S. 984 (1971); *Jones v. Lee Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

employer, is subjected to a renewal and an affirmative perpetuation of the effects of the original discriminatory termination. It is this active transmission of the effects of the past unlawful act into the present and future which constitutes a continuing violation of Title VII. *Kennan v. Pan American World Airways, Inc.*, 13 FEP Cases 1530, 1531-34 (N.D. Cal. 1976).

The application of the continuing violation concept to cases such as this does not impose on employers an affirmative duty to reinstate all discriminatorily terminated employees. A discharge followed by continuing non-employment, and even by a refusal to rehire which is not based on the discharge, does not constitute a continuing violation of Title VII; a charge of discrimination must be timely filed with relation to the date of discharge. *Collins v. United Air Lines, Inc.*, *supra*. However, it is clear that a refusal to rehire which is based on the prior unlawful discharge is an act which renews the past discrimination and which constitutes a present violation of Title VII. See *Stroud v. Delta Airlines, Inc.*, 392 F.Supp. 1184, 1189, 1193 (N.D. Ga. 1975).¹² Similarly, the act of reinstatement without previously earned seniority, and the continuing denial of that seniority thereafter, constitute an active renewal and perpetuation of the past illegality. These affirmative acts and practices are continuing violations of Title VII; mere continuing nonemployment following an unlawful discharge is not.

The decision of the court below does not eliminate the period of limitations for Title VII actions, nor does it permit employees to resurrect time-barred claims. Where, as here, an employee has been terminated and has failed to file a charge of discrimination within the statutory

¹² Thus, contrary to petitioner's suggestion, an affirmative here would not encourage employers to adopt a policy of refusing to rehire discriminatorily terminated former employees. Such a policy would be unlawful whether or not the continuing violation concept applies to the facts of the instant case.

period following her termination, she has irretrievably lost her right to obtain reinstatement, back pay, and other relief to which she would have been entitled solely as a remedy for the unlawful termination. The subsequent renewal and perpetuation of the effects of that past discrimination did not remove the bar to her old claim; she has lost the back pay and other compensation and benefits which she could have obtained had she filed a timely charge following her termination in 1968. But, since her reemployment in 1972, she has been subjected to an active and continuing denial of her Title VII rights, and this denial gives rise to a new claim for relief which clearly is not barred by time. Although she cannot now recover the full remedy which she could have obtained for her unlawful termination had she filed a timely charge in 1968, she is entitled to relief for the present, continuing violation which has been occurring since her reemployment without seniority in 1972.¹³

The decision of the court below correctly recognizes that the continuing, affirmative perpetuation of the effects of past discrimination is itself a violation of Title VII. The statutory language, the legislative history, and the prior decisions of this Court under Title VII fully support this conclusion. Even as an employer modifies or eliminates a discriminatory policy which it has pursued in the past, it must also look to the future and review and adjust its seniority and other continuing practices to insure that the consequences of its past discrimination will not operate

¹³ Similarly, in the hypothetical examples posed in the Brief for Petitioner, at 19, the employees may be barred from recovering the full relief to which they would have been entitled had they filed charges within the statutory period following the original unlawful act, but they are not barred from obtaining a remedy for the present operation of practices which have perpetuated the effects of this original discrimination for thirty years. As noted above, the employer's back pay liability would be limited to that accruing no more than two years prior to the filing of such a charge. 42 U.S.C. § 2000e-5(g). Thus, the hypothetical employees would have irretrievably lost twenty-eight years of back pay.

indefinitely to deprive its victims of their rightful place in the employment hierarchy. While employers should not be required, and are not required by the decision in this case, to answer to time-barred claims of past discrimination, the remedial purposes of Title VII mandate that employers be held accountable for their present practices which perpetuate inequality in employment opportunity due to discrimination.

CONCLUSION

For the reasons stated above, this Court is urged to affirm the decision of the court of appeals.

Respectfully submitted,

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